

NO. 20-0291

IN THE SUPREME COURT OF TEXAS

**IN RE GREG ABBOTT,
GOVERNOR OF THE STATE OF TEXAS,
AND KEN PAXTON,
ATTORNEY GENERAL OF THE STATE OF TEXAS,**

Relators.

**On Petition for Writ of Mandamus
to the 459th District Court of Travis County, Texas**

AMICUS BRIEF OF THE PROFESSIONAL BONDSMEN OF TEXAS

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ATTORNEYS FOR AMICUS

I. Statement Regarding Amici Curiae

Amicus curiae is the Professional Bondsmen of Texas. It is a professional association of bondsmen licensed in the state of Texas before county bail bond boards across the state of Texas pursuant to chapter 1704 of the Texas Occupations Code or who are authorized to write bond in smaller counties in Texas pursuant to chapter 17 of the Texas Code of Criminal Procedure. All costs and fees associated with preparation of this brief will be paid by the Professional Bondsmen of Texas.

II. Introduction

The Texas Constitution requires that all elected and appointed officers take the official oath of office “before they enter the duties of their offices.” Tex. Const. Art. XVI, §1(a). An official taking the constitutional oath swears to faithfully execute the duties of the office and to preserve, protect, and defend the constitution and laws of Texas and the United States. *Id.* Before taking the oath, the official subscribes to a statement averring that the official has not paid or promised to pay a thing of value or promised employment in order to obtain the office. *Id.* §1 (b). The 16 misdemeanor judges from Harris County took the following oath when they took office:

"I, _____, do solemnly swear (or affirm), that I will faithfully

execute the duties of the office of _____ the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God."

Tex. Const. art. XVI, §1.

III. Relevant History

As the Court is aware, the 16 misdemeanor judges from Harris County are the majority of the real parties in interest before the trial court. In November 2018, all but one of the judges was elected on a platform of surrender and promises to no longer defend Texas law in a federal lawsuit filed by the ACLU and others alleging that certain local rules violated federal due process and equal protection requirements. The one judge who was not seeking reelection, at the time of the election, had already surrendered and refused to defend Texas law.

In 2019, the real parties in interest entered into a settlement. The federal court recognized that the settlement changed Texas law and that it granted relief that she could not grant on a trial on the merits. The trial court concluded that it was not her place to get between the parties on their settlement.

Further, the settlement on the part of the real parties in interest violated Texas constitutional and statutory law in numerous respects. First, the settlement, which incorporates Amended Local Rule 9, requires that all misdemeanor arrestees be

granted a personal bond without an individual determination of the amount of the bond to be set by a magistrate. Texas law requires a detainee be individually magistrated to determine the amount of bail. Tex. Code Crim. Pro. Arts. 17.01, 17.02, 17.03, 17.04, 17.05, 17.25.

Second, the settlement requires that all misdemeanor arrestees be released on a PR bond, without reviewing their criminal history unless they fall with certain carve out categories. This means that the vast majority of defendants are released without ever seeing a magistrate and their bail is set at an arbitrary amount of \$100.00. This violates articles 17.03 and 17.04 of the Texas Code of Criminal Procedure. Tex. Code Crim. Pro. art. 17.03, 17.04 which allows release on a PR bond only if a magistrate, in the exercise of his or her discretion, concludes that a PR bond is appropriate.

Third, the settlement prefers PR bonds to other forms of bond, in violation of articles 17.01, 17.02, 17.03, 17.04 and 17.15 and Texas common law, which requires an individualized assessment of the amount of the bond and prohibits differential bonds or a preference of one type of bond over another except in limited situations. *See Professional Bondsment of Tex. v. Carey*, 762 S.W.2d 691, 693 (Tex. App.—Amarillo 1988, no writ).

Fourth, the settlement prohibits use of secured money bail as a condition of pretrial release at any time in the pretrial period for any misdemeanor arrestee except for the limited carve outs. Section 1704.201 of the Texas Occupations Code requires the sheriff to accept or approve a bail bond executed by a bail bondsman properly filed or posted in the county in which the bondsman is licensed if (1) the bond is for a county or district case; (2) the bond is executed in accordance with chapter 1704 of the Occupations Code and the local county bail bond board rules; and (3) a bail bond is required as a condition of release of the defendant for whom the bond is executed. TEX. OCC. CODE ANN. §1704.201. The settlement and the Local Rule 9 violates Tex. Occ. Code Ann. §1704.201 because it requires the sheriff to reject an otherwise valid bond. For example, if a wanant is issued for a defendant's arrest and he is apprehended in another county, that defendant is entitled, pursuant to Article 15.17, to an individual hearing before a magistrate in the county of arrest (or, if more expeditious, before a magistrate in any other county), who may require a cash or surety bond. Also, the settlement/Local Rule 9 violates this section because it requires the sheriff to reject an otherwise valid surety bond in favor of PR bonds and "General Order Bonds", a creation unknown under Texas law. The sheriff has a ministerial duty to accept bonds that comply with Texas law. The Settlement/Local

Ruic 9.1 §4 would prohibit the sheriff from accepting otherwise valid surety bonds, in violation of state law.

Fifth, the settlement changes Texas law. Under current law, bail is set at the discretion of the trial court and that discretion will not be overturned absent a showing of an abuse of discretion. Additionally, certain capital offenses have additional safeguards that require a finding based upon a preponderance of the evidence. Tex. Const. Art. I, Sections 11 b (violation of condition of release) and 11 c (violation of protective order involving family violence). The settlement changes all of this and states that a surety bond (and presumably a cash bond) cannot be used unless there is a showing by clear and convincing evidence that no other form of release would be sufficient. The settlement requires a factual determination by clear and convincing evidence, in violation of Texas constitutional and statutory law. Essentially, the real parties in interest changed Texas law without any action on the part of the Governor, this Court or the Texas Legislature.

Sixth, the settlement provides for a least restrictive means analysis, which violates Tex. Code Crim. Pro. Arts. 17.01, 17.02, 17.03, 17.04, 17.15, and 17.25 and Texas common law which prohibit differential bail amounts or the preference of one form of bond over another. There were bills filed in the last two legislative sessions

which sought to change Texas law to his standard and the bills failed. The settlement imposes these requirements in Harris County even though there has been no change in the law by the Texas Legislature.

Seventh, the settlement authorizes the sheriff to refuse to enforce any surety bonds that do not comply with the proposed settlement, even if those surety bonds were validly issued in another county. Such action by the sheriff would be in violation of Tex. Occ. Code Ann. §1704.20 I. Moreover, the settlement provided for a "General Order Bond" in a pre-approved form which is arbitrarily set at \$1 00.00 and does not contain an individualized determination of the amount of bail required as by Tex. Code Crim. Pro. Arts. 17.01, 17.02, 17.03, 17.04, 17.15, and 17.25.

Further, the settlement changed the law in Texas regarding the requirements that a court must follow when the an arrestee fails to appear for court. Chapter 22 of the Texas Code of Criminal Procedure requires that any time there is a failure to appear, the trial court is required to issue a judgment nisi. The resolution of the failure to appear is governed by any defenses claimed in article 22.13 and any claim for remittitur set out in article 22.16 of the Texas Code of Criminal Procedure. The settlement states that a bond cannot be forfeited unless the arrestee was given actual notice of the hearing where he failed to appear. This is a change to Texas law as well.

In Texas, when a bond states that the defendant is required to appear "instanter" then the arrestee is subject to call of the court at any time with or without any additional requirement of notice. *Caudillo v. State*, 541 S.W.2d 617 (Tex. Crim. App. J 976). The settlement sets out additional proof requirements before a bond may be forfeited that are not currently required by Texas law. The proposed Consent Decree violates Chapter 22 because it states that a trial court attempts to change Texas law regarding forfeitures.

The Settlement also grants a great deal of relief to arrestees that is not authorized under Texas law, including the following:

- *Wavier of appearance*- The settlement changes article 28.01 of the Texas Code of Criminal Procedure which states that a defendant's presence is required during any pretrial proceeding and allows the defendant to not appear at certain hearings;
- *Unlimited delay*- authorizes a defendant the absolute right to reschedule court hearings without end.

Additionally, in the settlement the county agreed to hire a monitor to ensure compliance with the settlement. After the Governor issued Executive Order GA-13, the Monitor issued a letter on March 30, 2020, stating that there was no need to make

any changes regarding the settlement as a result of GA-13. A copy of the letter from the monitor is attached as Appendix A and is incorporated for all purposes. The monitor took the position that the settlement could continue as is. *Id.* Further, the letter argued even if GA-13 required changes to the settlement, no changes were necessary since the settlement was adopted by a consent decree in federal court. *Id.* The monitor argued that the Supremacy Clause of the constitution would trump Executive Order GA-13. *Id.*

On March 31, 2020, the undersigned attorney requested additional information from the monitor because his letter seemed patently incorrect. GA-13, at the very least, would require that a criminal background check be performed before a misdemeanor defendant could be released from jail and any defendant who had a past conviction for a violent offense or an attempted violent offense would not be eligible for a PR bond on a new arrest. Further, questions were raised whether the settlement agreement would be given Supremacy Clause protection. The Consent Decree approved a settlement. The federal court recognized that the settlement included relief that the court would not have had the authority to grant on the merits. Therefore, since the trial court did not have the authority to grant some or all of the relief set out in the settlement, the consent decree would have no more force than any

other agreement between a government official and a private party. *See System Federation v. Wright*, 364 U.S. 642, 651 (1961) ("the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce").

At the time of the settlement in Harris County, the advocates for change also filed a second suit seeking to extend the settlement to felony cases. The case has been sitting dormant for over a year. As a result of COVID-19, in approximately March of 2020, the plaintiffs filed a motion for temporary injunction asking the federal court to order Harris County to release approximately one half of the jail because of the pandemic. The county did not even oppose the motion. The Governor and the Texas Attorney General filed a motion to intervene alleging, in part:

Despite that, plaintiffs filed this suit and later sought emergency, substantive relief ordering the release of thousands of felony arrestees—exactly what the Fifth Circuit rejected. In response, the defendants here chose simply to raise the white flag: They “do not contest” any of the plaintiffs’ arguments, even though it portends further federal intrusion into the State’s criminal justice system and imperils the public safety as they now appear to seek the immediate release of those accused of serious felonies and their motion also potentially seeks the release of alleged murderers, rapists, and burglars.

Memorandum and Brief in Support of Motion to Intervene filed by the Texas Attorney General. The federal court granted the motion to intervene and because of

the actions of the Governor and the Texas Attorney General, the federal court ultimately denied the motion for temporary injunction even though it was not opposed by Harris County or the Sheriff.

III. Standing- The Harris County Judges Allege that the Governor Acted Improperly, in part, to Defend Improper Actions on Their Part

To address standing the court must address subject matter jurisdiction. *Tex. Ann'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). In the present case, the Harris County misdemeanor judges seek to defend an illegal bail system set up through a settlement that violates Texas law in numerous respects. As the Texas Attorney General has alleged, the county and the judges essentially “raised the white flag” and refused to defend Texas law even though it their duty as a result of the oath of office they took. Their refusal to follow their oath of office and the improper and illegal settlement that they entered defeats their right to standing in the underlying suit.

Also, in addressing this case, the court should look to the guidance from the Fifth Circuit in *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *6 (5th Cir. Apr. 7, 2020), which directs courts to defer to state actions taken in times of emergency, even if they infringe on individual constitutional rights. In this particular situation, the misdemeanor judges from Harris County seek to assert standing to defend an

illegal and improper process bail process that violates Texas Constitutional and statutory law. The judges are according to the letter dated March 30, 2020 are not following Executive Order GA-13 and now seek to have this court hold that the order is improper so that they can continue to implement their improper program and attempt to extend it to felony bonds as well.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae, the Professional Bondsmen of Texas ask the court of appeals to grant the petition for writ of mandamus and for such other and further relief either at law or in equity to which the Texas Governor and the Texas Attorney General may show just entitlement.

Respectfully submitted,

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By: /s/ Ken W. Good
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Curiae's Brief complies with the word-count limitations of Tex. R. App. P. 9.4 (i), if applicable, because it contains 2396 words. The count was calculated by the word processing software and excludes the sections authorized by the rule to be excluded from the word count.

/s/ Ken W. Good
Ken W. Good

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to the parties via electronic service unless otherwise indicated below on this 21st day of April 2020.

/s/*Ken W. Good*
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APPENDIX A



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March 30, 2020

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Re. Executive Order No. GA-13 & Compliance with Rule 9

Dear Parties:

I am writing to provide guidance on implementation of the Consent Decree as it relates to (1) Governor Greg Abbott's Executive Order No. GA-13, issued on March 29, and (2) the continued importance of making a finding of necessity to detain in any case where a Hearing Officer or Judge requires a person to pay an unattainable amount of secured bail. I write in my capacity as Monitor in the *ODonnell* Consent Decree.

1. The Executive Order Does Not Affect Implementation of Rule 9 and the Consent Decree:

On March 29, 2020, Texas Governor Greg Abbott issued an Executive Order purporting to prohibit personal bonds for certain people arrested for misdemeanor or felony offenses in Harris County. The Order is likely unconstitutional under state and federal law. But regardless of whether it is ultimately challenged and/or implemented, **Executive Order No. GA-13 does not affect any terms of the pre-existing ODonnell Consent Decree. Indeed, the state Order cannot affect the Consent Decree, because the Decree was entered by a federal court and is binding on all Parties regardless of any subsequent changes in state law. Accordingly, all Parties must continue to implement Rule 9 and all provisions of the Consent Decree without interruption.**

If anyone responsible for implementing or complying with the Consent Decree has any questions about the effect of the Executive Order, COVID-19, or any other state or local policy or practice on implementation or compliance with the Consent Decree, they are instructed to contact me immediately through any of the Party's representatives and I will provide prompt clarification.

2. Judges and Hearing Officers Must Make the Findings Required by Rule 9:

Additionally, I write to provide guidance on implementation of the provisions in Rule 9 requiring Judges and Hearing Officers to make specific findings on the record by clear and convincing evidence before detaining a person using unaffordable money bail.

The Consent Decree, and Rule 9, continues to fully apply in Harris County. Given the crisis concerning COVID-19, it is all the more important that the Judges and Hearing Officers take extreme care to ensure that no one is detained in the jail unless "necessary" to meet a compelling government interest. **To that end, Judges and Hearing Officers must ensure that they are making the individualized determinations required by the Decree. These include the on-the-record determinations, based on clear and convincing evidence, regarding ability to pay, and if a person cannot pay the amount required, that there is no less-restrictive condition(s) that can reasonably assure safety or to reasonably assure against flight. Rule 9.12.7.** ("These findings and procedures must be provided if the court imposes an order of pretrial detention, either through an unattainable financial condition or directly through an order of pretrial detention.").

We note that even in our initial review, upon assuming recently this role as Monitor, we have already observed instances of misdemeanor defendants detained without any clear or supportive findings. Indeed, we have even observed examples of cases in which individuals who do not fall into carve-out categories under Rule 9 have nevertheless been detained. We will continue to follow up through counsel based on those concerns.

Our Monitor Team will be carefully examining the Harris County system to ensure that there are no interruptions to implementation of Rule 9 and the Consent Decree due to either the March 29 Executive Order or the COVID-19 crisis. In particular, we will be reviewing video recordings of the bail hearings and the judges' and Hearing Officers' written findings to assure that there is sufficient grounds to support any detention decisions regarding eligible misdemeanor defendants. As stated above, I remain available as needed if questions arise regarding the effects of state or local action on Rule 9 or the Consent Decree.

Many thanks for all of the hard work you are doing during this time of urgent crisis in Harris County.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brandon L. Garrett", with a stylized, flowing script.

Brandon L. Garrett

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